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IN THE

Supreme Court of the United States

~~No. 814~~ 70-21

October Term, 1970

SOCIALIST LABOR PARTY, et al.,
Appellants,

vs.

JOHN J. GILLIGAN, GOVERNOR,
STATE OF OHIO, et al.,
Appellees.

~~No. 1104~~

October Term, 1970 70-56

HELEN A. SWEETENHAM, et al.,
Appellants,

vs.

JOHN J. GILLIGAN, GOVERNOR,
STATE OF OHIO, et al.,
Appellees.

On Appeal From the United States District Court For the Southern District of Ohio, Eastern Division

BRIEF

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JURISDICTION

These cases, brought for declaratory injunctive relief, involve questions of the constitutionality of certain election laws of the State of Ohio. In the *Socialist Labor Party* case, hereinafter also called the *political party case*, in conformity with the opinion of the District Court, the jurisdiction of the District Court was invoked under 42 U.S.C. Sections 1981, 1983 and 1988; 28 U.S.C. Section 1343 (3) and (4); 28 U.S.C. Sections 2201 and 2202; and the First and Fourteenth Amendments of the Constitution of the United States. In the *Sweetenham* case, hereinafter also called the *independent candidates case* in conformity with the opinion of the District Court, the jurisdiction of the District Court was invoked under 42 U.S.C. Section 1983; 28 U.S.C. Section 1343 (3) and (4); 28 U.S.C. Section 2201; and the following provisions of the Constitution of the United States: Article I, Section 2; Article IV, Sections 2 and 4; and the First, Ninth and Fourteenth Amendments

The order of the District Court in these cases was filed on July 29, 1970 and amended on July 31, 1970. Notices of appeal on behalf of the defendants James A. Rhodes, Governor of Ohio, Ted W. Brown, Secretary of State of Ohio, and Paul W. Brown, Attorney General of Ohio, also referred to herein as the appealing defendants, were filed in the District Court on August 17, 1970. The Board of Elections of Cuyahoga County, Ohio, which was named a party-defendant in *Sweetenham*, the *independent candidates case*, and participated in the District Court proceedings, did not file a notice of appeal. Subsequent thereto the defendant John Gilligan, Governor of the State of Ohio, was substituted for James A. Rhodes and William J. Brown, Attorney General of Ohio, was substituted for Paul W. Brown.

The statutory provisions believed to confer jurisdiction on this Court to hear these cases on appeal are 28 U.S.C.

Sections 1253 and 2101. The case believed to sustain jurisdiction is *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

OPINIONS BELOW

The opinion and order of the District Court in both of these cases are reported at 318 F. Supp. 1262 (S.D. Ohio, E.D. 1970) and are included in the Appendix at pp. 46-69. The Amended Order of the District Court may be found in the Appendix at pp. 70-71.

STATUTES INVOLVED

The appeals of the appealing defendants John J. Gilligan, Governor of Ohio, Ted W. Brown, Secretary of State, and William J. Brown, Attorney General, involve the following sections of the Ohio Revised Code. All pertinent sections of the Revised Code which have been amended subsequent to *Williams v. Rhodes* appear with amended clauses in capital type and deletions in canceled type. New statutes appear in capital type.

Sec. 3501.01. **Definitions.** As used in the sections of the Revised Code relating to elections AND POLITICAL COMMUNICATIONS AS SET FORTH IN SECTION 3599.09 OF THE REVISED CODE.

(A) "General election" means any election held on the first Tuesday after the first Monday in November.

(B) "Regular municipal election" means the election held on the first Tuesday after the first Monday in November in odd-numbered years.

(C) "Regular state election" means the election held on the first Tuesday after the first Monday in November in even-numbered years.

(D) "Special election" means any election other than the elections required to be regularly held on the day of a general or primary election, provided that a special election may also be held on the day of a general or primary election.

(E) "Primary" or "primary election" means an elec-

tion held for the purpose of nominating persons as candidates of political parties for election to offices, and for the purpose of electing persons as members of the controlling committees of political parties and as delegates and alternates to the conventions of political parties. Primary elections shall be held on the first Tuesday after the first Monday in May of each year.

(F) "Party" or "political party" means an aggregation of persons having the rights, privileges, and duties provided by law for political parties.

(G) "Dominant party in a precinct" or "dominant political party in a precinct" means that political party whose candidate for election to the office of governor at the next preceding regular state election received more votes than any other person received for election to said office in such precinct at such election.

(H) "CANDIDATE" MEANS ANY QUALIFIED PERSON CERTIFIED IN ACCORDANCE WITH THE PROVISIONS OF THE REVISED CODE FOR PLACEMENT ON THE OFFICIAL BALLOT OF A PRIMARY, GENERAL, OR SPECIAL ELECTION TO BE HELD IN THIS STATE, OR ANY QUALIFIED PERSON WHO KNOWINGLY ASSENTS TO SUCH REPRESENTATION BY ANOTHER AT EITHER A PRIMARY, GENERAL, OR SPECIAL ELECTION TO BE HELD IN THIS STATE.

(I) "QUESTION OR ISSUE" MEANS ANY QUESTION OR ISSUE CERTIFIED IN ACCORDANCE WITH THE PROVISIONS OF THE REVISED CODE FOR PLACEMENT ON ANY OFFICIAL BALLOT OF A PRIMARY, GENERAL, OR SPECIAL ELECTION TO BE HELD IN THIS STATE.

~~(H)~~ (J) "Elector" or "qualified elector" means a person having the qualifications provided by law to entitle him to vote.

~~(I)~~ (K) "Voter" means an elector who votes at any election.

~~(J)~~ (L) "Voting residence" means that place of residence of an elector which shall determine the precinct in which he may vote.

~~(K)~~ (M) "Precinct" means a district within a county established by the board of election of such county within which all qualified electors having a voting residence therein may vote at the same polling place.

~~(L)~~ (N) "Polling place" means that place provided for each precinct at which the electors having a voting residence in such precinct may vote.

~~(M)~~ (O) "Board" or "board of elections" means the board of elections appointed in a county pursuant to sections 3501.06 and 3501.07 of the Revised Code.

~~(N)~~ (P) "Political subdivision" means "county," "township," "city," "village," or "school district."

Sec. 3505.03. **Office type ballot.** On the office type ballot shall be printed the names of all candidates for election to offices, except judicial offices, who were nominated at the next preceding primary election as candidates of a political party or who were nominated in accordance with section 3513.02 of the Revised Code, and the names of all candidates for election to offices who were nominated by nominating petitions, except candidates for judicial offices, for member of the state board of education, for member of a board of education, for municipal offices, and for township offices.

The face of such ballot below the stub shall be substantially in the following form:

OFFICIAL OFFICE TYPE BALLOT

(A) To vote for a candidate place "X" in the rectangular space at the left of the name of such candidate.

(B) If you tear, soil, deface, or erroneously mark this

ballot, return it to the precinct election officers and obtain another ballot.

USE "X" ONLY IN MARKING BALLOT

The order in which the offices shall be listed on the ballot shall be prescribed by, and certified to each board of elections by, the secretary of state; provided that for state, district, and county offices the order from top to bottom shall be as follows: governor, lieutenant governor, attorney general, auditor of state, secretary of state, treasurer of state, United States senator, representative at large to congress, district representative to congress, state senate, state representative, county commissioner, county auditor, prosecuting attorney, clerk of the court of common pleas, sheriff, county recorder, county treasurer, county engineer, and coroner.

The names of all candidates for an office shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear, insofar as may be reasonably possible, substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.

The method of printing and combining the ballots in tablets to meet the rotation requirements of this section shall be as follows: The least common multiple of the number of names in each of the several groups of candidates shall be used and the number of changes made in the printer's forms in printing such ballots shall correspond with such multiple. On the first series of ballots, the names of the candidates in each group of candidates shall be in alphabetical order. On each succeeding series, the names of the candidates in each group of candidates which is first in the preceding series shall be last and the names of each of the candidates in each group shall be moved up one place. The printed ballots shall then be

combined in tablets by assembling series of ballots each consisting of one ballot of each series printed as described in this paragraph, assembled in the same consecutive order in which the series in which each ballot is a part was printed, dividing such assembled series of ballots in instances in which the total number of ballots in each series shall exceed the number of ballots required in a precinct and otherwise by combining as many of such assembled series of ballots as are necessary to make tablets consisting of the number of ballots required for each precinct.

Under the name of each candidate nominated at a primary election and each candidate certified by a party committee to fill a vacancy as provided by section 3513.31 of the Revised Code shall be printed the name of the political party by which such candidate was nominated or certified.

Except as provided in this section, no words, designations, or emblems descriptive of a candidate or his political affiliation, or indicative of the method by which such candidate was nominated or certified, shall be printed under or after a candidate's name which is printed on the ballot. [~~No blank spaces shall be provided on such ballot where an elector may write in the name of a person for whom he desires to vote, except that if no candidate has been nominated for an office or certified to fill a vacancy in a nomination for an office for which an election is to be held. blank spaces shall be provided under the title of said office equal in number to the number of persons to be elected to such office.~~]

Sec. 3505.10. **Presidential Ballot.** On the presidential ballot below the stubs at the top of the face thereof shall be printed "Official Presidential Ballot" centered between the side edges of the ballot. Below "Official Presidential Ballot" shall be printed a heavy line centered between the side edges of the ballot. Below said

line shall be printed "Instruction to Voters" centered between the side edges of the ballot, and below such words shall be printed the following instructions:

"(A) To vote for the candidates for president and vice-president whose names are printed below, mark "X" in the rectangular space at the left of the names of such candidates. Such "X" mark will be counted as a vote for each of the candidates for presidential elector whose names have been certified to the secretary of state and who are members of the same political party as the nominees for president and vice-president. AN "X" MARK FOR INDEPENDENT CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT SHALL BE COUNTED AS A VOTE FOR THE PRESIDENTIAL ELECTORS FILED BY SUCH CANDIDATES WITH THE SECRETARY OF STATE.

"(B) TO VOTE FOR CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT IN THE BLANK SPACE BELOW, MARK "X" IN THE LEFT RECTANGULAR SPACE AND WRITE THE NAMES OF YOUR CHOICE FOR PRESIDENT AND VICE-PRESIDENT UNDER THE RESPECTIVE HEADINGS PROVIDED FOR THOSE OFFICES. SUCH WRITE-IN WILL BE COUNTED AS A VOTE FOR THE CANDIDATES' PRESIDENTIAL ELECTORS WHOSE NAMES HAVE BEEN PROPERLY CERTIFIED TO THE SECRETARY OF STATE.

"~~(B)~~ (C) If you tear, soil, deface, or erroneously mark this ballot, return it to the precinct election officers and obtain another ballot."

Below such instructions to the voter shall be printed a single vertical column of enclosed rectangular spaces equal in number to the number of ~~political parties having~~ presidential candidates ~~whose names are to be printed on such ballot as provided in this section~~ PLUS ONE ADDITIONAL SPACE FOR WRITE-IN CANDIDATES. Each of such

rectangular spaces shall be enclosed by a heavy line along each of its four sides, and such spaces shall be separated from each other by one-half inch of open space.

In each of such enclosed rectangular spaces, EXCEPT THE SPACE PROVIDED FOR WRITE-IN CANDIDATES, shall be printed the names of the candidates for president and vice-president nominated as such by the national convention of a political party to which delegates and alternates were elected in this state at the next preceding primary election, AND THE NAMES OF THOSE INDEPENDENT CANDIDATES NOMINATED BY PETITION IN ACCORDANCE WITH SECTION 3513.258 OF THE REVISED CODE. The names of candidates for electors of president and vice-president ~~of any political party~~ shall not be placed on the ballot, but shall ~~after nomination~~ be certified to the secretary of state as required by ~~section~~ SECTIONS 3513.11 AND 3513.258 of the Revised Code. A vote for any of such candidates for president and vice-president shall be a vote for the electors of ~~the political party by which~~ such candidates ~~were nominated and~~ whose names have been certified to the secretary of state.

The arrangement of the printing in each of such enclosed rectangular spaces shall be substantially as follows: Near the top and centered within the rectangular space shall be printed "For President" in ten point boldface upper and lower case type. Below "For President" shall be printed the name of the candidate for president in twelve point boldface upper case type. Below the name of the candidate for president shall be printed the name of the political party by which such candidate for president was nominated in eight point lightface upper and lower case type. Below the name of such political party shall be printed "For Vice-President" in ten point boldface upper and lower case. Below "For Vice-President" shall be printed the name of the candidate for

vice-president in twelve point boldface upper case type. Below the name of the candidate for vice-president shall be printed the name of the political party by which such candidate for vice-president was nominated in eight point lightface upper and lower case type. NO POLITICAL IDENTIFICATION OR NAME OF ANY POLITICAL PARTY SHALL BE PRINTED BELOW THE NAMES OF PRESIDENTIAL AND VICE-PRESIDENTIAL CANDIDATES NOMINATED BY PETITION.

The rectangular spaces on the ballot described in this section shall be rotated in such order on the ballots, and the ballots shall be so combined in tablets for use at the polling place in each precinct on election day, that on no two consecutive ballots in a tablet shall such spaces be in the same order.

Sec. 3513.041. **Write-in Space Required; Declaration of Intent of Write-in Candidate.** A WRITE-IN SPACE SHALL BE PROVIDED ON THE BALLOT FOR EVERY OFFICE, BUT WRITE-IN VOTES SHALL NOT BE COUNTED FOR ANY CANDIDATE WHO HAS NOT FILED A DECLARATION OF INTENT TO BE A WRITE-IN CANDIDATE PURSUANT TO THIS SECTION. A QUALIFIED PERSON WHO HAS FILED A DECLARATION OF INTENT MAY RECEIVE WRITE-IN VOTES AT EITHER A PRIMARY OR GENERAL ELECTION. ANY CANDIDATE, EXCEPT ONE WHOSE CANDIDACY IS TO BE SUBMITTED TO ELECTORS THROUGHOUT THE ENTIRE STATE, SHALL FILE A DECLARATION OF INTENT TO BE A WRITE-IN CANDIDATE BEFORE FOUR P.M. OF THE TWENTIETH DAY PRECEDING THE ELECTION AT WHICH SUCH CANDIDACY IS TO BE CONSIDERED. IF THE ELECTION IS TO BE DETERMINED BY ELECTORS OF A COUNTY OR A DISTRICT OR SUBDIVISION WITHIN THE COUNTY, SUCH DEC-

LARATION SHALL BE FILED WITH THE BOARD OF ELECTIONS OF THAT COUNTY. IF THE ELECTION IS TO BE DETERMINED BY ELECTORS OF A SUBDIVISION LOCATED IN MORE THAN ONE COUNTY, SUCH DECLARATION SHALL BE FILED WITH THE BOARD OF ELECTIONS OF THE COUNTY IN WHICH THE MAJOR PORTION OF THE POPULATION OF SUCH SUBDIVISION IS LOCATED. IF THE ELECTION IS TO BE DETERMINED BY ELECTORS OF A DISTRICT COMPRISED OF MORE THAN ONE COUNTY BUT LESS THAN ALL OF THE COUNTIES OF THE STATE, SUCH DECLARATION SHALL BE FILED WITH THE BOARD OF ELECTIONS OF THE MOST POPULOUS COUNTY IN SUCH DISTRICT. ANY CANDIDATE FOR AN OFFICE TO BE VOTED UPON BY ELECTORS THROUGHOUT THE ENTIRE STATE SHALL FILE A DECLARATION OF INTENT TO BE A WRITE-IN CANDIDATE WITH THE SECRETARY OF STATE BEFORE FOUR P.M. OF THE TWENTIETH DAY PRECEDING THE ELECTION AT WHICH SUCH CANDIDACY IS TO BE CONSIDERED. IN ADDITION, CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES SHALL ALSO FILE WITH THE SECRETARY OF STATE BY SAID TWENTIETH DAY A SLATE OF PRESIDENTIAL ELECTORS SUFFICIENT IN NUMBER TO SATISFY THE REQUIREMENTS OF THE UNITED STATES CONSTITUTION.

THE SECRETARY OF STATE SHALL PRESCRIBE THE FORM OF THE DECLARATION OF INTENT TO BE A WRITE-IN CANDIDATE.

Sec. 3513.10. **Filing Fees of Candidates.** At the time of filing a declaration of candidacy for nomination for any office, OR A DECLARATION OF INTENT TO BE A WRITE-IN CANDIDATE, each candidate shall pay a fee

of one-half of one per cent of the annual salary of such office; but in no case shall such fee be less than one nor more than fifty dollars. No fee shall be required of candidates filing for the office of delegate or alternate to the national convention of political parties, member of the state central committee, or member of the county central committee. [~~Candidates whose names are written in on the ballot, as provided in section 3513.23 of the Revised Code, and who are nominated, shall pay the same fee as candidates who declare their candidacy. Payment of this fee by such candidates shall be a condition precedent to the granting of their certificates of nomination.~~] All such fees shall forthwith be paid by the officer receiving them into the state treasury, in the case of fees received by the secretary of state, and into the county treasury to the credit of the county general fund, in the case of fees received by a board of election. In no case shall be the filing fee be returned to a cadidate.

Sec. 3513.11. **Delegates and Alternates to the State Party Convention.** In the year 1952 and in each second year thereafter, each political party in the state shall hold a state convention composed of delegates who shall be its candidates for election to state offices, except judicial offices; its candidates for election to the office of member of the senate of the United States, member of the house of representatives of the United States, and member of the general assembly of Ohio; the members of its state central and executive committees, and the chairman of its county central and executive committees; and 500 delegates to be apportioned by the state central committee of the respective parties among the several counties of the state in proportion to its party's vote for governor cast in the several counties at the last preceding general election; provided that in any even-numbered year in which no election is to be held to elect successors to incumbents of any of the offices mentioned in this section, except judicial offices, each such incumbent shall

also be a delegate to the state convention of his political party. The delegates to such convention apportioned to each county by the state central committee of the respective parties shall be selected by the county executive committees of the respective parties.

At each convention of a political party the state platform of such party for such year shall be formulated.

The state central committee of each political party shall fix the time and place for holding the convention of its party.

At the state convention of each political party held in 1952, and in each fourth year thereafter, persons shall be nominated as candidates for election as presidential electors to be voted for at the next succeeding general election. Within five days after the holding of each such convention the chairman and secretary thereof shall certify in writing to the secretary of state the names of all persons nominated at such convention as candidates for election as presidential electors.

Sec. 3513.12. **National Convention Delegates and Alternates.** At the primary election which shall be held on the first Tuesday after the first Monday in May in the year 1952, and similarly in every fourth year thereafter, delegates at large and alternates at large to the national conventions of the different political parties shall be chosen by direct vote of the electors in the manner prescribed in sections 3513.01 to 3513.32, inclusive, of the Revised Code, for the nomination of candidates for state offices, except that whenever any group of candidates for delegate at large or alternate at large file with the secretary of state statements as provided by this section, designating the same persons as their first and second choices for president of the United States, such a group of candidates may submit a group petition containing a declaration of candidacy for each of such candidates, and such group petition need be signed only by the number of

electors required for the petition of a single candidate, provided that no group petition may be submitted except by a group of candidates equal in number to the whole number of delegates at large or alternates at large to be elected.

Candidates for election as delegates and alternates to such conventions from districts within the state shall be chosen by direct vote of the electors in the manner prescribed in such sections for the nomination of candidates for district offices, except that whenever any group of candidates for district delegate and alternate file with the secretary of state statements as provided by this section, designating the same persons as their first and second choices for president of the United States, such a group of candidates may submit a group petition containing a declaration of candidacy for each of such candidates, and such group petition need be signed only by the number of electors required for the petition of a single candidate, provided that no group petition may be submitted except by a group of candidates equal in number to the whole number of district delegates and alternates to be elected. Each person seeking to be elected as delegate or alternate to such national convention shall file with his declaration of candidacy and certificate a statement in writing signed by him in which he shall state his first and second choice for nomination as candidate of his party for the presidency of the United States. The secretary of state shall not permit any declaration of candidacy and certificate of a candidate for election as such delegate or alternate to be filed unless accompanied by such statement in writing; provided that the name of no candidate for the presidency shall be so used without his written consent. The name of such first and second choice for nomination as candidate for the presidency of each candidate for election as such delegate or alternate shall be printed and appear on the primary

ballots immediately below the name of such candidate in such a way as to clearly disclose the preference of each candidate. Each candidate for election as such delegate or alternate may also file along with his declaration of candidacy and certificate a statement in writing signed by him in the following form:

Statement of candidate for election

as {delegate / alternate} to the (here insert name of political party) national convention.

I hereby declare to the voters of my political party in the state of Ohio that, if elected as

{delegate / alternate} to their national party convention,

I shall, to the best of my judgment and ability, support that candidate for president of the United States who shall have been selected at this primary by the voters of my party in the manner provided in sections 3513.01 to 3513.32, inclusive, of the Revised Code, as their candidate for such office.

For signature of candidate for {alternate / delegate}

Sec. 3513.19. **Challenge of Electors; Determination of Political Affiliation.** At a primary election every qualified elector who is twenty-one or more years of age, or who will be twenty-one or more years of age on or before the day of the next general election, and who is a member of or is affiliated with the political party whose primary election ballot he desires to vote, shall be entitled to vote such ballot at such primary election. It is the duty of any witness or challenger and of any judge or clerk of elections and the right of any elector, when-

ever he doubts that a person attempting to vote at a primary election is legally entitled to vote at such election, to challenge the right of such person to vote. The right of a person to vote at a primary election may be challenged upon the following grounds:

(A) That the person whose right to vote is challenged is not a legally qualified elector;

(B) That he has received or has been promised some valuable reward or consideration for his vote;

(C) That he is not affiliated with or is not a member of the political party whose ballot he desires to vote.

Membership in or political affiliation with a political party shall be determined, as to one who has voted in a previous regular state election, by his sworn statement as to how he voted in the next preceding regular state election at which he voted. If he states under oath that at the next preceding regular state election at which he voted, he voted for a majority of the candidates of that political party of which, at the time of the challenge, he claims to be a member, or with which he then claims to be affiliated, he shall be deemed to be a member of and affiliated with such political party. If a person states under oath that he has not voted at a previous regular state election and that he desires to be a member of and affiliated with a particular political party, he shall be deemed to be a member of and affiliated with such political party.

Sec. 3513.191. **Qualification.** No person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years.

Sec. 3513.252. **Independent Candidates for Office in Municipality of More Than 2,000 Population.** The nominating petitions of independent candidates for election

as officers of a municipal corporation having a population in excess of two thousand, as ascertained by the next preceding federal census, in which a primary was held for the nomination of candidates of a political party for the next preceding regular municipal election and in municipal corporations in excess of two thousand, as ascertained by the next preceding federal census, where primaries were eliminated because the number of persons filing declarations of candidacy as candidates of one political party did not exceed as to any office, the number of candidates to be nominated for such office, shall be signed by not less than twenty-five qualified electors of the municipal corporation, or a ward thereof in case of the nominating petition of a candidate for election as councilman from such ward, in which the candidate designated therein would be a candidate for election as an official thereof or not less than ~~seven~~ FOUR per cent of the number of electors who voted for governor, OR FOR PRESIDENTIAL ELECTORS, at the next preceding regular state election in the municipal corporation, or a ward thereof in case of the nominating petition of a candidate for election as councilman from such ward, whichever is the greater; provided that no such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section. Such petition shall be filed with the board of elections not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

Sec. 3513.256. **Independent Candidates for County Office.** The nominating petition of independent candidates for the office of county commissioner, county auditor, prosecuting attorney, clerk of the court of common

pleas, sheriff, county recorder, county treasurer, county engineer, coroner, shall be signed by not less than twenty-five qualified electors of the county, or not less than ~~seven~~ FOUR per cent of the number of electors who voted for governor, OR FOR PRESIDENTIAL ELECTORS, at the next preceding regular state election in the county, whichever is the greater. The nominating petition of independent candidates for the office of judge of probate court, judge of the court of common pleas, and such other courts as are established by statute, shall be signed by qualified electors not less in number than ~~seven~~ FOUR per cent of the number of electors who voted for governor, OR FOR PRESIDENTIAL ELECTORS, at the next preceding regular state election in the territory over which such court has jurisdiction, or twenty-five hundred electors, whichever is the lesser number.

No such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section. Such petition shall be filed with the board of elections not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

Sec. 3513.257. **Independent Candidates for Office of State Representative, State Senator, District Representative to Congress, and Judge of the Court of Appeals.** The nominating petition of an independent candidate for the office of representative to the general assembly, senator of the general assembly, and district representative to congress, shall be signed by not less than ~~seven~~ FOUR per cent of the number of electors who voted for governor, OR FOR PRESIDENTIAL ELECTORS, at the next preceding regular state election for the office of governor in the district. The nominating petition of independent candidates for the office of judge of the court of appeals shall

be signed by qualified electors not less in number than ~~seven~~ FOUR per cent of the number of electors who voted for governor, OR FOR PRESIDENTIAL ELECTORS, at the next preceding regular state election in the territory over which such court has jurisdiction, or twenty-five hundred electors, whichever is the lesser number.

No such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section. If the district consists of more than one county, such petition shall contain the signatures of at least fifty electors from each of at least one-half of the several counties of such district. Such petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census, not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

Sec. 3513.258. **Independent Candidates for State Office, President and Vice-President of the United States, United States Senator, and Representative at Large to Congress.** The nominating petition of an independent candidate for the office of governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney general, judge of the supreme court, PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES, United States senator, and representative at large to congress, shall be signed by not less than ~~seven~~ FOUR per cent of the number of electors who voted for governor, OR FOR PRESIDENTIAL ELECTORS, at the next preceding regular state election; provided that no such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating

in number more than twice the minimum aggregate number of signatures required by this section. Such petition shall contain signatures of at least two hundred electors from each of at least thirty counties in the state, and the total number of signatures of electors from any one county shall not be in excess of one fourth of the total number of signatures required on the petition. Such petition shall be filed with the secretary of state not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

NO NOMINATING PETITION FOR INDEPENDENT CANDIDATES FOR THE OFFICES OF PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES SHALL BE ACCEPTED FOR FILING UNLESS THERE IS SUBMITTED TO THE SECRETARY OF STATE, AT THE TIME OF FILING THE PETITION, A SLATE OF PRESIDENTIAL ELECTORS SUFFICIENT IN NUMBER TO SATISFY THE REQUIREMENTS OF THE UNITED STATES CONSTITUTION.

Sec. 3517.01. **Definition of Political Party.** A political party within the meaning of Title XXXV of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state OR NOMINEES FOR PRESIDENTIAL ELECTORS AT LEAST ~~ten~~ SEVEN per cent of the entire vote cast for ~~governor~~ such OFFICE or which filed with the secretary of state ~~at least ninety days before an election~~ a petition signed by qualified electors equal in number to at least ~~fifteen~~ SEVEN per cent of the total vote for governor OR NOMINEES FOR PRESIDENTIAL ELECTORS at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding PRIMARY election,

HELD IN EVEN-NUMBERED YEARS, THAT OCCURS MORE THAN ONE HUNDRED TWENTY DAYS AFTER THE DATE OF FILING. ~~Such petition shall be circulated, signed, verified, and the signatures thereon examined and certified to in the same manner as is required of referendum petitions.~~ No such group of electors shall assume a name or designation which is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. When any political party fails to cast ~~ten~~ SEVEN per cent of the total vote cast at an election for the office of governor OR PRESIDENT it shall cease to be a political party.

Sec. 3517.012. **LEGAL EXISTENCE OF NEW PARTY.** WHEN A PETITION MEETING THE REQUIREMENTS OF SECTION 3517.01 OF THE REVISED CODE DECLARING THE INTENTION TO ORGANIZE A POLITICAL PARTY IS FILED WITH THE SECRETARY OF STATE, THE NEW PARTY COMES INTO LEGAL EXISTENCE ON THE DATE OF FILING AND IS ENTITLED TO HOLD A PRIMARY ELECTION AS SET OUT IN SECTION 3513.01 OF THE REVISED CODE, AT THE PRIMARY ELECTION, HELD IN EVEN-NUMBERED YEARS THAT OCCURS MORE THAN ONE HUNDRED TWENTY DAYS AFTER THE DATE OF FILING.

Sec. 3517.013. **CANDIDATES OF NEW PARTIES EXEMPTED FOR FOUR YEARS.** SECTION 3513.191 OF THE REVISED CODE DOES NOT APPLY TO PERSONS DESIRING TO BECOME CANDIDATES FOR PARTY NOMINATION OF A NEWLY FORMED POLITICAL PARTY MEETING THE REQUIREMENTS OF SECTIONS 3517.011 AND 3517.012 OF THE REVISED CODE FOR A PERIOD OF FOUR CALENDAR YEARS FROM THE DATE OF THE PARTY FORMATION.

Sec. 3517.014. **CANDIDATES OF NEW PARTIES EXEMPTED AT FIRST PRIMARY.** THOSE PROVISIONS OF SECTION 3513.19 OF THE REVISED CODE RELATING TO THE DETERMINATION OF MEMBERSHIP IN OR POLITICAL AFFILIATION WITH A PARTY DO NOT APPLY TO PERSONS DESIRING TO BECOME CANDIDATES FOR PARTY NOMINATION OF A NEWLY FORMED POLITICAL PARTY MEETING THE REQUIREMENTS OF SECTIONS 3517.011 AND 3517.012 OF THE REVISED CODE AT THE FIRST PRIMARY HELD BY THAT PARTY IN THE EVEN-NUMBERED YEAR OCCURRING SUBSEQUENT TO THE FORMATION OF THAT PARTY.

Sec. 3517.015. **SIGNERS OF DECLARATION OF CANDIDACY FOR NEW PARTY DEEMED MEMBERS REGARDLESS OF PRIOR POLITICAL AFFILIATION.** QUALIFIED ELECTORS WHO SIGNED DECLARATIONS OF CANDIDACY OF PERSONS DESIRING TO BECOME CANDIDATES FOR PARTY NOMINATION OF A NEWLY FORMED POLITICAL PARTY MEETING THE REQUIREMENTS OF SECTIONS 3517.011 AND 3517.012 OF THE REVISED CODE AT THE FIRST PRIMARY ELECTION HELD BY THAT PARTY IN THE EVEN-NUMBERED YEAR SUBSEQUENT TO THE PARTY FORMATION ARE NOT SUBJECT TO SECTION 3513.19 OF THE REVISED CODE AND SHALL, FOR THE PURPOSE OF SIGNING SAID DECLARATIONS OF CANDIDACY, BE DEEMED MEMBERS OF THE NEWLY FORMED POLITICAL PARTY REGARDLESS OF PRIOR POLITICAL AFFILIATION.

Sec. 3517.016. **ANY ELECTOR MAY VOTE THE NEW PARTY BALLOT AT ITS FIRST PRIMARY ELECTION.** AT THE FIRST PRIMARY ELECTION HELD BY A NEWLY FORMED POLITICAL PARTY MEETING THE REQUIREMENTS OF SECTIONS

3517.011 AND 3517.012 OF THE REVISED CODE, ANY QUALIFIED ELECTOR WHO DESIRES TO VOTE THE NEW PARTY PRIMARY BALLOT IS NOT SUBJECT TO SECTION 3513.19 OF THE REVISED CODE AND SHALL BE ALLOWED TO VOTE THE NEW PARTY PRIMARY BALLOT REGARDLESS OF PRIOR POLITICAL PARTY AFFILIATION.

Sec. 3517.02. **Election of Controlling Committees.** All members of controlling committees of a political party shall be elected by direct vote of the members of the party, except as otherwise provided in section 3517.05 of the Revised Code. Their names shall be placed upon the official ballot and the person receiving the highest number of votes for committeemen shall be the members of such controlling committees. Each member of a controlling committee shall be a resident and qualified elector of the district, ward, or precinct which he is elected to represent.

Sec. 3517.03. **Party Controlling Committees.** The controlling committees of each political party or organization shall be a state central committee consisting of two members, one a man and one a woman, from each congressional district in the state; a county central committee consisting of one member from each election precinct in the county, or of one member from each ward in each city and from each township in the county, as the outgoing committee determines; and such district, city, township, or other committees as the rules of the party provide.

All the members of such committees shall be members of the party and shall be elected by direct vote at the primary held in the even-numbered years. Candidates for election as state central committee members shall be elected at primaries in the same manner as provided in sections 3513.01 to 3513.32, inclusive, of the Revised Code, for the nomination of candidates for office in a

county. Candidates for election as members of the county central committee shall be elected at primaries in the same manner as provided in such sections for the nomination of candidates for county offices.

Each party controlling committee shall elect an executive committee which shall have such powers as are granted to it by the party controlling committee, and as are provided by law. When a judicial, senatorial, or congressional district is comprised of more than one county, the chairman and secretary of the county central committee from each county in such district shall constitute the judicial, senatorial, or congressional committee of such district. When a judicial, senatorial, or congressional district is included within a county, the county central committee shall constitute the judicial, senatorial, or congressional committee of such district.

Sec. 3517.04. **Organization of Party Central Committee.** The members-elect of each party central committee shall meet not earlier than six nor later than fifteen days following the date of the primary election at a suitable place and time to be designated by the retiring chairman of the committee. Notice of such meeting, giving the place and time, shall be sent to each member-elect by the retiring secretary of the committee by mail and a copy of the notice shall be posted in the office of the secretary of state or board of elections, as the case may be, at least five days prior to any such meeting. The meeting shall be called to order by the retiring chairman or secretary or if there is no such officers, or if such officer is absent, then by a member of such committee designated by the secretary of state in the case of the state committees, and by a member of the board of elections of the same political party, designated by the board, in the case of county committees. A temporary chairman and secretary shall be chosen and the committee shall proceed to organize by the election of a

chairman, vice-chairman, treasurer, secretary, and such other officers as the rules provide.

Sec. 3517.07. **Parties or Groups Engaged in Un-American Activities Barred from Ballot.** No political party or group which advocates, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government or which carries on a program of sedition or treason by radio, speech, or press or which has in any manner any connection with any foreign government or power or which in any manner has any connection with any group or organization so connected or so advocating the overthrow, by force or violence, of our local, state, or national government or so carrying on a program of sedition or treason by radio, speech, or press shall be recognized or be given a place on the ballot in any primary or general election held in the state or in any political subdivision thereof.

Any party or group desiring to have a place on the ballot shall file with the secretary of state and with the board of elections in each county in which it desires to have a place on the ballot an affidavit made by not less than ten members of such party, not less than three of whom shall be executive officers thereof, under oath stating that it does not advocate, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government; that it does not carry on any program of sedition or treason by radio, speech, or press; that it has no connection with any foreign government or power; that it has no connection with any group or organization so connected or so advocating, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government or so carrying on a program of sedition or treason by radio, speech, or press.

Said affidavit shall be filed not less than six nor more than nine months prior to the primary or general elec-

tion in which the party or group desires to have a place on the ballot. The secretary of state shall investigate the facts appearing in the affidavit and shall within sixty days after the filing thereof find and certify whether or not this party or group is entitled under this section to have a place on the ballot.

Any qualified member of such party or group or any elector of this state may appeal from the finding of the secretary of state to the supreme court of Ohio.

This section does not apply to any political party or group which has had a place on the ballot in each national and gubernatorial election since the year 1900.

STATEMENT OF THE CASES

These cases involve several key aspects of numerous election laws of the State of Ohio. In *Williams v. Rhodes*, 293 U.S. 23 (1968) this Court had occasion to consider portions of the same body of law under circumstances involving extreme haste, for which the Court was not at fault. The State has dutifully endeavored to follow the extensive opinion in *Williams, supra*, as reflected by various amendments of the Ohio Statutes since its announcement. On January 28, 1970, the Socialist Labor Party filed in the U.S. District Court for the Southern District of Ohio, Eastern Division, a complaint challenging the constitutionality of nine Ohio election laws. The party sought ballot status for its candidates in the November, 1970 general election. The political party case was consolidated with another case challenging several statutory requirements for independent candidates.

The case was heard by a three-judge court after the filing of opposing motions for summary judgment. The court held unconstitutional several of the contested statutes, but upheld the validity of Ohio's election oath. While the court ordered the candidates of the Socialist Labor Party be placed on the ballot, it denied similar relief to the independent candidates. The Socialist Labor Party has appealed the District Court's ruling with regard to the loyalty oath. The plaintiffs Sweetenham, Stapleton, and Tussey have appealed the constitutionality of Ohio's requirement that nominating petitions for independent candidates be filed before the general election. The State has appealed from that part of the decision of the District Court holding Ohio's election laws invalid.

More specifically, the court adjudged the following statutes or parts thereof as being unconstitutional: §3517.01 as amended (the 7% requirement for political party ballot status); §3505.10 as amended, and §3513.12 as amended (requiring national party conventions for

party candidates for presidential nomination); §3513.11 (requiring state conventions and state-wide party organization); §3517.02, .03, and .04 (specifying the organizational structure of a party). The District Court rulings on these statutes are appealed by the defendants in the Socialist Labor Party case (the political party case), which is case number 814 in this Court and number 70-23 in the court below. The plaintiffs have also appealed certain holdings in this portion of the consolidated case with respect to the party oath requirement of §3517.07 of the Ohio Revised Code. The defendants have also appealed the court's same ruling on the party oath requirement for different reasons.

In the independent candidates case, the court below adjudged portions of two of Ohio's election laws unconstitutional. Those sections are 3513.257 and 3513.258. The former deals with requirements for independent candidates for U.S. Representatives while the latter deals with requirements for independent candidates for governor of the State of Ohio. The defendants have appealed the ruling of the court below on portions of these statutes. The plaintiffs, Sweetenham, et al., appealed the refusal of the District Court to declare unconstitutional the ninety day requirements of the same statutes. The ninety day provision requires independent candidates to file a nominating petition prior to the primary election but gives the independent candidates more time within which to file their nominative petitions than party candidates are given.

In the 1970 general election in Ohio, in conformance with the District Court opinion and ruling, the candidates of the Socialist Labor Party were placed on the ballot, but the independent candidates were not, due to their failure to comply with the valid ninety day requirement (*supra*).

The plaintiffs filed in this Court a Motion to Affirm,

petitioning the Court to affirm those portions of the District Court's decision which the State has appealed. The defendants in turn filed a Motion to Dismiss and Brief in Support thereof, which asked this Court to dismiss the Socialist Labor Party's appeal of the District Court's affirmance of the oath requirement. On March 29, 1970, this Court noted probable jurisdiction and thus, in effect, overruled these two motions. 39 U.S.L.W. 3424 (March 29, 1971).

QUESTIONS PRESENTED

1. Is the provision contained in Section 3517.01, Ohio Revised Code, that a group desiring recognition as a political party in Ohio either have polled seven percent of the vote in the last preceding election for governor or nominees for presidential elections or present a petition to the Secretary of State containing the signatures of qualified voters who represent seven percent of the votes cast in the last preceding election for governor or nominees for presidential elections, unconstitutional?

2. Are the provisions of Sections 3517.02, 3517.03, and 3517.04, Ohio Revised Code, which Sections specify the organizational structure of a political party in Ohio, unconstitutional?

3. Is the provision contained in Section 3513.11, Ohio Revised Code, that a political party elect a specified number of delegates and alternates to a state convention, unconstitutional?

4. Are the provisions of Section 3505.10, Ohio Revised Code, relating to the presidential ballot, unconstitutional, even though this Section has been amended to provide space on the ballot for the names of independent candidates?

5. Are the provisions of Section 3513.12, Ohio Revised Code, relating to national convention delegates and alternates, unconstitutional, even though this Section has been amended to permit the filing of group petitions?

6. Is the "Loyalty oath" prescribed by Section 3517.07, Ohio Revised Code, unconstitutional on its face?

7. Are the provisions of Section 3513.257, Ohio Revised Code, which requires an independent candidate for the office of representative to Congress to file a nominating petition signed by four percent of the number of electors who voted for governor or presidential electors in the district at the last preceding regular state election and a similar part of Section 3513.258, Ohio Revised

Code, which requires signatures of qualified voters representing four percent of the total state vote for governor or nominees for presidential election in the last preceding election.

8. Are the provisions of Section 3513.258, Ohio Revised Code, which require an independent candidate for statewide office to file a nominating petition including the signatures of at least two hundred electors from at least thirty counties, and limit the number of signatures from any one county to no more than one fourth of those needed, unconstitutional?

SUMMARY OF ARGUMENT

This Court in its majority opinion in *Williams v. Rhodes*, found nine statutes, in their totality, unconstitutional. The Ohio legislature subsequently revised its election code significantly. The District Court below in this new lawsuit involving the Socialist Labor Party and independent candidates declared the amendments unconstitutional as well as newly enacted statutes. The many amendments of substance changed the electoral process in Ohio, making it substantially easier for third parties, as well as for write-in and independent candidates, to gain access to the ballot. As a result of these changes the District Court below should not have found nine statutes unconstitutional.

An examination of the changes, in the light of cases decided subsequent to the *Williams* case, including *Jenness v. Fortson*, 39 U.S.L.W. 4791 (June 21, 1971), which was decided after the District Court case below, should have compelled a totally different result.

The District Court should not have declared amended §3517.01 unconstitutional because it drastically reduced (by over 50%) the number of signatures required for a new party to obtain ballot status. It should not have declared unconstitutional the amended statutes which reduced signature requirements for independent candidates from 7% to 4%, another substantial reduction which *a fortiori* does not violate Equal Protection standards. These statutes have a "30 county requirement" (out of the 88 counties) which is much less burdensome than the Illinois statutes in *Moore v. Ogilvie*, 394 U.S. 814 (1969), a 50 county requirement out of 112 or forty-nine percent.

Further, the District Court below narrowly interpreted Ohio's party election oath, §3517.07, stating that it attempts to prohibit mere advocacy and is thus overly broad. Such a narrow interpretation is not necessary

since the State of Ohio is not penalizing advocacy but merely preventing political parties that advocate unlawful action access to a means for achieving such unlawful actions.

It is, therefore, apparent that in their entirety, the Ohio Election laws do not violate the First or Fourteenth Amendments, but on the contrary, are legitimate requirements aimed at protecting Ohio's voting public and promoting our system of representative government.

ARGUMENT

I. SINCE THE OHIO LEGISLATION HAS DRASTICALLY ALTERED THE STATE'S ELECTION LAWS TO MEET THE CONSTITUTIONAL OBJECTIONS IN *WILLIAMS V. RHODES*, THE CURRENT CHALLENGE TO OHIO'S ELECTION LAWS INVOLVES A TOTALLY DIFFERENT STATUTORY FRAMEWORK THAN THE ONE PREVIOUSLY CONSIDERED BY THIS COURT.

In October of 1968, this Court held that a portion of the State of Ohio's Election Laws to choose presidential electors as a totality, were constitutionally infirm under the First and Fourteenth Amendments. *Williams v. Rhodes, et al.*, 393 U.S. 23 (1968). Pursuant to that ruling, the Ohio Legislature amended significantly many of these statutes, so that the totality of laws with which this Court was confronted in the *Williams* case is not presently before it. Pursuant to this Court's decision most of the old objectionable statutes were amended and many totally new ones were passed in the 1969 session of the Ohio Legislature. The instant cases involved an entirely different set of circumstances and offices, viz. Governor of the State of Ohio, United States Senator and United States Representative. The latter office is not a part of the political party case.

Effective October 30, 1969, the Legislature amended the following sections of the Ohio Revised Code:

(1) 3501.01 (write-in candidates);

(2) 3501.03 (abolishing the prohibition against write-in votes);

(3) 3505.10 (presidential ballot providing for independent and write-in candidates);

(4) 3513.252 (reduction in nominating petition signature requirements from 7% to 4% for independent candidates in municipal elections);

(5) 3513.256 (reduction in nominating petition signa-

ture requirements from 7% to 4% for independent candidates in county office elections);

(6) 3513.257 (reduction in nominating petition signature requirements from 7% to 4% for independent candidates in district office elections);

(7) 3513.258 (reduction in nominating petition signature requirements from 7% to 4% for independent candidates in statewide and national office elections);

(8) 3513.19 (new parties exempted by 3517.014, 3517.015, 3517.016 to aid new parties in obtaining votes);

(9) 3513.191 (new political parties exempted from challenge of electors for four years).

The Legislature enacted entirely new legislation also:

(1) 3517.012 (when new party comes into legal existence it may participate in the first primary thereafter);

(2) 3517.013 (candidates of new parties exempted from prohibition against switching parties for four years);

(3) 3517.014 (candidates of new parties exempted from challenge of political affiliation in primary);

(4) 3517.015 (electors signing nominating petitions deemed members of the new political party regardless of prior political affiliation); and

(5) 3517.016 (any elector may vote the new party ballot at its first primary election).

Of the statutes which were dealt with in the majority opinion of the Court, §§3513.05 and 3517.02-04 were not amended, but are presently in the process of being amended by the Ohio Legislature. An entirely different set of statutes is therefore now before this Court. The District Court below declared four of the election statutes, as amended, unconstitutional, viz. §§3505.10 (presidential ballot providing for independent and write-in candidates); 3513.257 (nominating petitions of independent candidates for district office-signatures reduced from 7% to 4%); 3513.258 (nominating petitions of independent candidates for state-wide and national offices—sig-

natures reduced from 7% to 4%); and 3517.01 (definition of a political party—signatures reduced from 15% to 7%). The District Court declared unconstitutional also unamended §§3513.12 (delegates and alternates to the National Party Convention); 3517.02 (procedure for electing party controlling committee—if the party has such a committee); 3517.03 (composition of party controlling committees); 3517.04 (organization of party central committees); and 3513.11 (delegates and alternates to the state party convention); some of which were dealt with in totality in the Court's majority opinion in *Williams v. Rhodes, supra.* All statutes which in combination were declared unconstitutional by this Court but which contrariwise were declared unconstitutional individually by the District Court below in the instant cases, are presently in the process of being amended further.

II. CHANGES IN THE TOTALITY OF OHIO'S ELECTION LAWS HAVE CREATED A LIBERAL CLIMATE FOR NEW PARTIES TO PARTICIPATE IN THE ELECTION PROCESS.

A. The Reduction Of The Signature Requirement From 15% to 7% Of The Registered Voters In The Last Gubernatorial Election Significantly Changes The Totality Of Ohio's Election Scheme.

In the instant case plaintiffs in the political party case are the Socialist Labor Party, its Ohio State Committee and Joseph Pirincin as a member, individually and on behalf of others. The complaint alleges that the amended §3517.01 of the Ohio Revised Code, which reduces the signature requirement, places an unreasonable burden on the plaintiffs' right of access to the ballot. The three Judge District Court below agreed and so held.

Ohio Revised Code §3517.01 presently requires a new

party to obtain petitions signed by an amount equal to only 7% of the voting electors instead of the former objectionable 15%—a reduction in number of signatures of approximately 225,000, based upon the 1968 figures, which this Court then had before it. This drastic reduction of a constitutionally burdensome provision in and of itself is sufficient to change the "totality" of the Ohio election laws. The Court's opinion stresses the totality concept at pages 32 and 34 of the *Williams* case, *supra*. Moreover, §3517.01 does not require that signatures come from any specified number of counties.

This Court has previously approved a 5% nominating petition requirement in *Jenness v. Fortson*, 39 U.S.L.W. 4791 (June 21, 1971). In fact, this requirement is more burdensome than the Ohio 7% petition requirement. Georgia's requirement is 5% of the registered voters at the last general election for the office in question, while Ohio's requirement is 7% of the actual vote cast for governor or for nominees for presidential electors at the last preceding election, Ohio Revised Code §3517.01. Since in Ohio approximately 69% of all eligible registered voters actually vote, the 7% is effectively 4.83% of all registered voters, as compared to 5% in Georgia. (Registration is required in only 50% of the Ohio counties: 3,276,231 voters cast ballots in the 1970 Gubernatorial election out of 4,747,391 eligible voters; the data used comes from the office of Secretary of State of Ohio and the U.S. Census Bureau.) In turn, Georgia's 5% is actually 7.14% of all those who voted in the last election, assuming approximately 70% of all registered voters vote in Georgia's election, as is true in Ohio. Georgia's requirement is more burdensome than Ohio's 7% of those actually voting.

This Court has recently approved a 5% (by district) petition requirement for political parties under a Florida election statute. The 5% applies to registered voters.

Beller v. Askew, 39 U.S.L.W. 3462 (S.D. Fla. 1970), affirmed without opinion, 39 U.S.L.W. 3554 (June 21, 1971); accord, *Beller v. Adams*, Fla. 325 S. 2d 502 (1970). The 5% requirement for number of signatures for independent candidates has been approved also by this Court. *Jackson v. Ogilvie*, 39 U.S.L.W. 2456 (N.D. Ill. 1971), affirmed without opinion, 39 U.S.L.W. 3553 (June 21, 1971). As the Ohio statutes now stand, there are no more constitutionally objectionable procedures than those which were passed upon in *Wood v. Putterman*, 316 F. Supp. 646 (D. Md. 1970), affirmed 91 S. Ct. 104 (1970).

The Court has most recently held that it was the combination of Ohio statutes which was objectionable and which made it virtually impossible for third parties to obtain ballot position *Jenness v. Fortson*, 39 U.S.L.W. 4791 (June 21, 1971). As shown both above and below, the Ohio statutory scheme has been drastically changed, and no longer freezes the political party status quo in Ohio.

B. New Statutes Providing For Independent Candidates On The Presidential Ballot, Write-in Votes, And Exemptions For New Parties Have In Combination Abolished The Possibility Of A Two-Party Monopoly in Ohio.

This Court found particularly "invidious," in addition to Ohio Revised Code §3517.01, (at the old 14% requirement) the fact that there was no provision for ballot position for independent candidates for the Presidency or Vice Presidency. *Williams v. Rhodes*, at 26. The State of Ohio has now supplied that deficiency with Ohio Revised Code §3513.258 (nominating petitions of independent candidates for state-wide and national offices—signatures reduced from 7% to 4%). Moreover, the Court found constitutionally infirm the requirement that petitions for party ballot status had to be filed by February

of the election year. *Williams v. Rhodes*, 26, 33. That provision has been changed to require slightly earlier filing, but new political parties and their candidates are now excused and exempted from certain otherwise mandatory primary provisions. These statutes were specifically designed in response to the Court's opinion in *Williams* at page 32, that new parties struggling for their place must have time and opportunity to organize.

By operation of this Court's opinion, Ohio Revised Code Sections 3517.02 to 3517.04 are of no effect—requirements for state central committeemen for new parties. The District Court below recognized these provisions as being for naught. *Socialist Labor Party v. Rhodes* (now Gilligan) (App. P. 51), 318 F. Supp. 1262 at 1266 (S.D. Ohio, 1970).

At the time of *Williams v. Rhodes*, Ohio had abolished write-in votes—there being no provision for them. *Williams v. Rhodes, supra*, at 35. Write-in votes are now provided for: Ohio Revised Code §§3513.041, 3501.01 (H), 3505.10, and 3513.10.

In view of the above, it can no longer be accurately said that Ohio endeavors to give the Republicans and Democrats a complete monopoly. The totality of Ohio's election statutes now is as constitutional as are those of Georgia in *Jenness v. Fortson*, 39 U.S.L.W. 4791 (June 22, 1971).

In the *Jenness* case, a "political body" candidate or an independent candidate to obtain ballot status has to obtain signatures equal to 5% of those eligible to vote. This criterion, to show voter interest, is more burdensome than the Ohio standard which requires only 7% of those who voted—a significantly smaller number. An examination of the Court's opinion as delivered by Mr. Justice Stewart shows Ohio's position vis-a-vis Georgia. Ohio, the same as Georgia, provides: for write-in votes; inde-

pendent nominees need not trace endorsement to a political party; "political party" has been defined (7% of actual votes) so as not to exclude all but the two major parties; and elaborate primary election machinery is not required. It may further be noted that Georgia requires candidates pay a filing fee of 5% of the annual salary of the office sought; Ohio has a filing fee of only one-half of 1%—but a maximum of fifty dollars ($50)—Ohio Revised Code §3513.10.

III. THE REQUIREMENTS OF PARTY ORGANIZATION AND STATE AND NATIONAL CONVENTIONS ARE NOT UNCONSTITUTIONALLY BURDENSOME SINCE THEY ARE OPTIONAL AND MUST BE CONSIDERED IN CONJUNCTION WITH OTHER LIBERAL ELECTION STATUTES.

The District Court below declared unconstitutional §§3517.02, .03, and .04. These sections are referred to in discussion above. This Court, in the *Williams* case, *supra*, held that within the context of that statutory pattern they were constitutionally infirm. These three statutes provide for political party organization. An examination shows that they are not mandatory. These sections are built upon a political party which has voluntarily established a controlling committee. If there is no controlling committee, there is no need for compliance. Neither §3517.02 nor the following sections require or demand, expressly or otherwise, the establishment of a controlling committee. It is only after a party organization voluntarily establishes a controlling committee that the mandatory provision of the three sections apply. Nevertheless, the District Court re-ruled these sections unconstitutional and ordered the State not to enforce them. There was no evidence that the State was trying to enforce them. In the context of this case, the statutes should not be held to be unconstitutional. In the present totality,

they should not be considered constitutionally infirm.

Ohio Revised Code §3513.11, providing for delegates and alternates to state conventions of political parties, was not dealt with in the Court's majority opinion in *Williams, supra.* It was, however, in Mr. Justice Douglas' separate concurring opinion. *Williams v. Rhodes*, 393 U.S. 23 (1968) at 36 n. 3. See also the dissent of Mr. Justice Stewart at 52 n. 7. In the light of the statutory changes set forth in detail, *supra*, this Ohio statute should not be held unconstitutional, nor should Ohio Revised Code Section 3513.12 providing for election of presidential electors and party platforms. While this Court's decision in *Williams, supra*, was based only on the presidential electors, the present case is not. It is based upon a party candidate for the offices of United States Senator and independent candidate for United States Representative. There are no allegations that the State of Ohio was forcing the plaintiff Socialist Labor Party to conform to these two statutory provisions. Plaintiffs have claimed, and defendants deny, that these provisions prevent the Socialist Labor Party from obtaining recognition as a party. Recognition as a party takes place upon compliance with §3517.01 of the Ohio Revised Code—the 7% signature requirement. The factual issue has never been presented because of the inability of the Socialist Labor Party to comply with the provisions of 3517.01. Neither of the above two statutes, taken in conjunction with all the amendments as well as with the entirely new election statutes, should be considered constitutionally infirm. In realistically viewing these allegedly burdensome requirements of §§3513.11, 3513.12, as well as 3517.02-.04, of the Ohio Revised Code, they are not burdensome at all in the light of the new liberal provisions of interrelated §3513.258, which allows for write-in candidates for President, Vice President of the United States, state offices, United States Senator, Representative at Large

to the United States Congress, and independent candidates for these offices. Other offices are covered by §3513.257. The signature requirement was reduced from seven percent to four percent. A list of Presidential electors must be filed, but there are no requirements for cumbersome political machinery or conventions or any other procedure which may be deemed burdensome.

It is particularly unfortunate that the District Court below should have declared unconstitutional §3513.12. The District Court erroneously assumed that §3513.12 had been amended subsequent to *Williams, supra*. It was not. Further, the District Court stated that this Court held §3513.12 unconstitutional. *Williams* does not so hold. The Court below based its decision on these erroneous foundations, and should be reversed. A reading of §3513.12 does not show any mandatory requirement for a party to have a national convention.

IV. OHIO'S PARTY OATH REQUIREMENT DOES NOT RESTRICT ADVOCACY BUT ONLY PREVENTS PARTIES THAT ADVOCATE THE OVERTHROW OF THE GOVERNMENT BY FORCE OR VIOLENCE FROM ATTAINING THE MEANS TO EXECUTE THEIR ILLEGAL GOALS.

While the district court also held that the statute requiring a party election oath given a narrow interpretation was constitutional, the court in its opinion intimated that §3517.07 is unconstitutional on its face because it attempts to prohibit mere advocacy and is thus overly broad. This issue was the third cause of action below and was treated as part of the Party case in the decision. This is a case of first impression with respect to an organizational oath for political parties. The court below cited *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), in support of this contention. Yet this case is readily distinguishable from the party oath presently under con-

sideration. In *Keyishian* all employees of New York's educational system were required to swear that they did not "by word of mouth or writing wilfully and deliberately" advocate, advise, or teach the doctrine of forceful overthrow of the government. This Court held that that oath was invalid partly because it might have the effect of restricting the advocacy of abstract ideas in the classroom. No such danger to academic freedom is present in the Ohio oath. The election oath operates not to restrict political parties from advocating programs, but only prevents parties that advocate the forceful or violent overthrow of the government from attaining the means to execute their illegal goals. In this regard, Ohio's prohibition against the appearance on the ballot of parties that advocate the overthrow of the government by force or violence meets the constitutional standard enunciated by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), also cited by the district court in its opinion. In *Brandenburg*, the Court stated that a state may not proscribe "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and likely to incite or produce such action." *Brandenburg, supra*, at 447. The State of Ohio through the express words of the party oath requirement is not penalizing advocacy by prescribing a criminal sanction as in *Brandenburg*, but only preventing political parties that advocate unlawful action from producing such objectives.

This court has approved oaths required of a candidate in a state election. *Gerende v. Election Board*, 341 U.S. 56 (1951). This Court has, however, disapproved on various grounds, individual oaths required of persons in occupations such as teaching *Keyishian, supra*; *Whitehall v. Elkins*, 389 U.S. 54 (1967); and state employment *Elfrant v. Russell*, 384 U.S. 11 (1966); *Cramp v. Board of Public Instruction*, 386 U.S. 278 (1961). In none of

these cases has the Court held that an oath requirement *per se* is unconstitutional. Nor has the Court considered an oath taken on behalf of a political party rather than a single individual.

V. OHIO'S DISTRICT AND STATE-WIDE INDEPENDENT CANDIDATE STATUTES ARE VALID AS REASONABLE RESTRICTIONS ON ACCESS TO BALLOT POSITION.

A. Evidence of Four Percent Voter Support Is A Reasonable Condition Of Ballot Position And Not A Denial Of Due Process.

Sections 3513.257 and 3513.258 of the Ohio Revised Code provide independent candidates access to ballot position by way of nominating petitions and are reasonable conditions placed by the State on the right to ballot position in a local or statewide election. It is proper for a state, in the exercise of its election powers, to require: 1) some showing of voter interest in a candidate, and 2) that such support be evidenced at some reasonable date prior to the election. The three-judge District Court below recognized that the above Code sections properly dealt with the latter requirement in *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262, 1273. It is the former requirement with which this portion of the appeal is concerned.

Ohio Revised Code Section 3513.257 requires that a candidate for Representative to the United States House of Representatives submit a nominating petition containing the signatures of four percent of those voters who voted for governor or presidential electors in the district at the preceding regular state election.

In *Jackson v. Ogilvie*, 39 U.S.L.W. 2456 (N.D. Ill 1971), affirmed without opinion 39 U.S.L.W. 3553 (June 21, 1971), the Court stated:

> "In *Briscoe v. Kusper* 39 U.S.L.W. 2386 (7th Cir. 1970) the court noted 'A state clearly has a substantial interest in administering its own

> local election. This state concern reasonably includes regulation of candidates, and it may well call for limitations on access to ballots by those seeking public office .' " 39 U.S.L.W. 2456 (Feb. 23, 1971)

With this as a basic principle, the court in *Jackson v. Ogilvie, supra,* upheld an Illinois election statute which required a candidate to file a petition signed by at least *five percent* of the district's voters who last voted for the specific office sought. The court, in a *per curiam* decision stated:

> "We determine that the five percent requirement is sufficiently narrow to satisfy due process." 39 U.S.L.W. 2456, 2457.

In accord with this opinion is *Beller v. Adams,* Fla., 235 So. 2d 502 (1970) in which the Florida Supreme Court upheld a 5% (of registered voters) petition requirement for independent candidates to attain ballot position.

Williams v. Rhodes, supra, did not specifically deal with Section 3513.257, Revised Code, and therefore, clearly does not stand as declaring Ohio's four percent requirement unconstitutional. As Justice Edenfield stated in *Jenness v. Fortson,* 315 F. Supp. 1035 (N.D. Ga. 1970), aff. with opinion June 21, 1971 39 U.S.L.W. 4791 (June 21, 1971), another independent candidate case upholding a five percent petition requirement:

> "Clearly, therefore, neither in *Williams* nor elsewhere has the Court ruled that the requirement of the signatures of 5%, or even 15%, of the voters on nominating petition is unconstitutional . . . this Court simply cannot say, as a matter of law, that Georgia's 5% is either unreasonable or that it constitutes invidious, intentional, or purposeful discrimination as charged by the plaintiffs." 315 F. Supp. 1035, 1040.

If the five percent signature requirement as was found constitutional in both *Jenness v. Fortson, supra,* and *Jackson v. Ogilvie, supra,* is constitutional, *a fortiori*

Ohio's four precent is a reasonable and fair limitation on an access to the ballot. A state has a compelling interest to keep the ballot at a reasonable length to avoid voter confusion and miscast votes. Further, this Court in *Williams v. Rhodes, supra,* recognized that the State had a valid interest in having candidates elected by the majority:

> "Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of the voters." 393 U. S. 23, 32 (1968).

B. Ohio's Thirty County Requirement Is A Reasonable And Legitimate Requirement For State-Wide Candidates And Does Not Violate *Reynolds v. Sims* Doctrine.

Ohio Revised Code Section 3513.258 also has a four percent petition requirement which is reasonable and fair as discussed in the preceding paragraphs. In addition to the four percent provision, a candidate for state-wide office, such as Governor, must obtain 200 signatures from each of at least 30 counties and no more than one-fourth of the total number of signatures can come from one county. There are 88 counties in Ohio and it seems reasonable that Ohio should require of an independent candidate for state-wide office some degree of state-wide support. A state-wide candidate should not only know the problems and needs of the citizens in all counties of the State, but some representative number of voters from at least a significant geographical, as well as numerical, portion of the state should be backing him in his solutions, programs and ideas. Four percent of the voters from 34% of the counties does not seem unreasonable at all.

A much more stringent provision was declared unconstitutional by the court in *Socialist Workers Party v. Rockefeller* 314 F. Supp. 984 (S.D. N.Y. 1970), affirmed without opinion 91 S. Ct. 65 (1970). The New

York statute with which the court was dealing required a certain number (50) of signatures from each and every county in the state. It is admitted that such a showing of statewide support might be oppressive to an independent candidate. However, the Ohio requirement of 30 out of 88 counties is not oppressive and satisfies a legitimate state inerest. In *Moore v. Ogilvie*, 394 U.S. 814 (1969), the Supreme Court dealt again with the state-wide support for the independent candidate. There this Court, changing from *MacDougall v. Green*, 335 U. S. 281 (1948), held that Illinois law unconstitutional. Illinois required support from 50 of 112 counties, or 49% of the counties. Ohio's law is still less restrictive in requiring support of only 34% of the counties.

It is, therefore, apparent that both Sections 3513.257 and 3513.258 are legitimate instruments used by the State of Ohio to promote and facilitate its interest in protecting the voting public and preserving the one-man/one-vote system of our democracy.

CONCLUSION

A reversal of the District Court below would not run *contra* to this Court's decision in *Williams, supra.* Nor would a reversal run contrary to *Hadenott v. Amos,* 394 U. S. 358 (1969) and the rights of freedom of association, and the rights of voters to cast their votes effectively. Ohio has reduced the barriers placed on independent candidates in contrast to what Alabama did in *Hadnott, supra.* A careful examination of the entire statutory pattern now before the Court will reveal no unjustified discrimination in the selection of public officials which could undermine the legitimacy of representative government. *Kramer v. Union Free School District #15,* 395 U.S. 621 (1969). This is especially true in cases involving states which "have long been held to have broad powers to determine the conditions under which the right of sufferage may be exercised." *Evans v. Corman,* 398 U.S. 419 (1970). It may now be said that any differences in the statutes in treatment are in favor of third party candidates or are in the category of the minor differences which the Equal Protection Clause permits. *Lyons v. Davoren,* 402 F. 2d 841 (1st Cir. 1968). The new statutes treated herein, as well as the old, are still entitled to the presumption of constitutionality. *Alaska Packers Association v. Industrial Accident Commission of California,* 294 U.S. 532 at 543 (1935). This is true with regard to election statutes also. *Wood v. Putterman,* 316 F. Supp. 513 (D. Conn., 1970).

In view of the liberalization of Ohio election statutes (provision for write-in candidates, reduction of the signature requirement for the Presidential ballot by 8% and for independent candidates for all offices by 3%, provision for filing of Presidential Electors by petition rather than by party convention, and other new provisions) this Court should rveerse the District Court below and find

that the combination of all election statutes, §§3517.01, 3505.10, 3517.02, 3517.03, 3517.04, 3513.12, as well as the portions of §§3513.257 and .258, are constitutional and consonant with the First and Fourteenth Amendments to the United States Constitution.

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